IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JUL 17 1973
MICHAEL RODAK, JR., CLK

No. 73-133

OLD DOMINION BOX COMPANY, INCORPORATED,
Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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July 16, 1973

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The petitioner, Old Dominion Box Company, Incorporated, a Virginia Corporation, (herein called the Taxpayer) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 18, 1973.

OPINION BELOW

The opinion of the Court below (copy hereto appended) has not yet been reported.

JURISDICTION

The Statutory Provision providing for certiorari in this case is 28 U.S.C. 1254 (1); this petition for certiorari is being filed within 90 days of April 18, 1973, when the opinion of the Court of Appeals was entered. The grounds upon which the jurisdiction of this Court is invoked are that the questions presented are of substantial importance in the administration of the tax laws; the judgment of the Court below is in conflict with the decisions of this Court; the opinions of the Circuit Courts on the first question are in conflict between the Circuits and panels of the same Circuit; and the regulations as applied by the Commissioner are not authorized by the statutes under which they are promulgated.

QUESTIONS PRESENTED

1. Whether the Taxpayer's Claim for Refund was sufficient to permit recovery on the theory that it made a gift which was intended for and reached a charitable entity.

2. Whether the Taxpayer's gift, made more than five years prior to the revocation of exemption of the immediate donee, the Dillard foundation, Inc. ("the Foundation") was innocent.

3. Whether the Taxpayer's gift was to or for the use of a charitable donee.

STATUTES AND REGULATIONS RESPECTIVELY INVOLVED

1. As to question No. 1:

§7422(a) of the Internal Revenue Code of 1954 (herein "IRC"), 26 U. S. C. 7422(a) reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Secretary or his delegate according to the provisions of law in that regard and the regulations of the Secretary or his delegate established in pursuance thereof."

U. S. Treasury Regulations 301.6402-2 (b) (1) and (c), 26 C.F.R. §301.6402-2 (b) (1) and (c), read as follows:

> "(b)(1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of per-

jury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

"(c) Claims by the taxpayer for refunding of overpayments of taxes, interest, penalities, and additions to tax shall be made on Form 843. For special rules applicable to income tax, see §301.6402-3. For other provisions relating to credits and refunds of taxes other than income tax, see the regulations relating to the particular tax."

§301.6402-3(a)(1) of the Regulations, 26 C.F.R. §301.6402-3(a)(1), reads as follows:

"(a)(1) In the case of income tax, claims for refund may not only be made on Form 843 but may also be made on any individual, fiduciary, or corporation income tax return, or on any amended income tax return."

2. As to questions Nos. 2 and 3:

There are set out in the appendix the following statutes and regulations involved in questions 2 and 3:

IRC, §170(a)(1), 26 U.S.C.170 (a)(b)
IRC, §170 (c)(2), 26 U.S.C. 170 (c)(2)
Regulations 1.170-3(a)
Rev. Proc. 64-25, C.B.1964-1,694

STATEMENT OF THE CASE (AND THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE)

This proceeding was initiated by the Taxpayer in the Federal District Court for the Western District of Virginia at Lynchburg in 1970 to recover an alleged overpayment of Federal Income Taxes for the year 1959, consequent upon the disallowance of a charitable contribution of $75,000 made to the Foundation for the use of the Lynchburg Fine Arts Center, Inc. ("Center").

The Taxpayer's income tax return for 1959 on Form 1120, filed in 1960, showed a deduction for a contribution of $76,932.72 on page one, and on a schedule attached showed a contribution of $75,000 to the Foundation and a carry over of $1,932.72. The complaint in this case had attached to it a letter of the Commissioner dated August 4, 1965, revoking the exempt status of the Foundation; and a copy of the Taxpayer's claim for refund giving as reasons for the refund that the gift of $75,000 was deductible as a contribution made to a qualified charitable entity and that the contribution was innocently made in reliance on the donee's charitable status.

At the time of a pre-trial conference held on January 12, 1971, during a discussion of settlement, the Taxpayer brought expressly to the attention of the Commissioner's attorney that the contribution was made to the Center, the charitable status of which is conceded, via the Foundation, the charitable status of which was established in 1953, first questioned in 1963, and suspended in 1965. During a pre-trial con-

ference on June 5, 1972, the decision of Faulkner v. Commissioner (1st Cir. 1940), 112 F.2d 987, sustaining the deductibility of such a gift, was called to the attention of the Court and the Commissioner; the Commissioner informally agreed to an amendment of the complaint to set out the facts, already given to the Commissioner before the Claim for Refund was filed, making the principle of Faulkner applicable; the order amending the complaint was returned by the Assistant Attorney General duly endorsed; and the complaint was amended to allege:

> "4A. The contribution of $75,000 was intended by the plaintiff for and was duly received by Lynchburg Fine Arts Center, Inc., which was at all relevant times a charitable corporation within the meaning of said Section 501(c)(3), contributions to which were deductible for Federal Income Tax purposes."

At the suggestion of the District Court, a jury was requested by the defendant, and four questions were initially submitted for verdict:

1. Did the Dillard Foundation operate at all times during the twelve-month period ending November 30, 1959 for religious, charitable, and educational purposes?

   _____
   Yes or No

2. If the answer to question 1 is "no", was the Dillard Foundation operating for religious, charitable, and educational purposed when the gift

of $75,000 was pledged on October 30, 1959?

_____
Yes or No

3. If the answers to both questions 1 and 2 are "no", was the plaintiff an innocent contributor when the gift of $75,000 was pledged on October 30, 1959?

_____
Yes or No

4. If the answers to questions 1, 2 and 3 are "no", was the $75,000 gift intended for Lynchburg Fine Arts Center, Inc., and did it reach the Center?

_____
Yes or No

The Commissioner objected to questions 2 and 4, the latter on the ground that the Claim for Refund did not sufficiently notify the Commissioner of the application of the Faulkner principle.

Shortly after the Taxpayer had begun to present its evidence, the Government agreed that question 4 should be answered "yes" and taken from the jury, which was done; this action resulted from a consideration of "follow-the-res" documents, (infra, pp. 10-11) presented in evidence, which the Commissioner had had in his possession prior to the filing of the Claim for Refund. The Government then successfully contended that the Taxpayer's Claim for Refund was not sufficient to put the

Government on notice of the theory of recovery which was the basis for question 4; and, the jury having answered the other 3 questions in favor of the Government, judgment was entered for the Government. Judgment was affirmed on appeal to the Fourth Circuit, the opinion being announced on April 18, 1973; and petition for rehearing was denied on May 17, 1973.

A statement of the additional facts necessary to an understanding of the questions in this case is necessarily somewhat extended. These facts, however, are pertinent to a consideration of all questions, since it is believed that, through his examination of the returns of the Taxpayer and of the Foundation, the Commissioner was at all pertinent times, and before his rejection of the Claim for Refund, in possession of all of the facts and the ground of the Claim.

In 1959, the Taxpayer sold a portion of its business located in Charlotte, North Carolina for the sum of $2,500,000, which produced for it an unusually large income, enabling it to make an unusually large aggregate of charitable gifts. This boon was in part offset by the Commissioner's efforts to impose heavy taxes which began upon the filing of the Taxpayer's Federal Income Tax Return in 1960 and are still continuing.

Up until the year 1963, the Commissioner's efforts were principally directed toward the disallowance in the year of sale of deduction for depreciation on certain equipment sold in 1959. Preparing to concede this point, the Commissioner for the first time raised the question of the dis-

allowance of a gift of $75,000 made on October 30, 1959 by the Taxpayer to the Foundation for the Center. This gift was shown on page 1 of the Taxpayer's return for 1959 on Form 1120; and was also shown as a contribution to the Foundation on a schedule attached to the return.

After two years of studying the return and other records and information re the Taxpayer and the Foundation, the Commissioner on August 4, 1965 retroactively revoked his 1953 ruling that the Foundation was an exempt organization. The ground of the revocation was that the Foundation had dealt in certain securities for the benefit of one of its creators, later identified as E. S. Dillard. The Taxpayer, upon the disallowance of the $75,000 gift, filed Claim for Refund dated September 21, 1967; and the Commissioner rejected the Claim by letter dated October 15, 1968. Before this letter or rejection was issued, further conferences had been held with the Taxpayer, and the Commissioner by letter dated July 19, 1968 had restored the exempt status of the Foundation, but only as of December 1, 1960.

The Taxpayer's principal stockholder was David Hugh Dillard, who was also the controlling force in the Taxpayer's operations. His son, E. S. Dillard, was also an officer and director of the Taxpayer. D. H. Dillard's brother, Starke Dillard, was principal owner of a corporation located in Winston-Salem, North Carolina. All were interested in securing a continuity of contributions to local charities partially dependent upon gifts from them for their operations. Toward the end of 1951, the above individuals and others connected

with their businesses organized the Foundation as a North Carolina charitable corporation, the accountant and attorney at that time being William T. Minor, Jr., who also served as accountant and attorney for the Taxpayer. The Foundation was not an operating charitable entity, but a conduit for charities engaged in active educational and other non-exempt work. On the date of March 24, 1953, the Commissioner ruled the Foundation to be an exempt organization, but in the ruling letter warned that because of the nature of the Foundation, the continuance of its exempt status would be dependent upon its distributing its gifts solely to organizations that were properly exempt under the Internal Revenue laws. This warning was made sharper by the Commissioner's pointing out some of the Foundation's donees which had not obtained formal rulings of exemption.

After the Foundation was organized, the Dillards and their corporations made their principal gifts through it. From 1951-63, the Foundation had received gifts aggregating about $600,000, by far the largest being the gift of $75,000 from the Taxpayer in 1959. It disbursed over the same period less than the amount received, but continued its disbursements after 1963.

All gifts received, all investments, and all distributions were regularly reported item by item each year by the Foundation to the Commissioner on its information returns.

Prior to 1959, David Hugh Dillard had committed himself to raising $100,000 for the Center. By resolution of October 30, 1959, the Taxpayer gave $75,000 to the Foun-

dation. On February 23, 1960, the Taxpayer funded the gift by delivering to the Foundation three $25,000 debentures, receipt of which was shown on the Foundation's information return for 1960. By letter of April 6, 1960, the Foundation made a gift of $5,000 to the Center. By letter of June 6, 1961, the Foundation sent the three $25,000 debentures for redepmtion. The Foundation check stubs 172-175 showed a deposit of $75,000 bringing its deposits to over $95,000. By check of June 12, 1961 (and accompanying letter), the Foundation distributed to the Center $95,000. These documents were all delivered to the Commissioner and studied from 1963 to 1968 in determining the deduction of the $75,000, and constitute the "follow-the-res" documents.

The $75,000 gift here in question was kept invested by the Foundation in Valley Board debentures until they were redeemed and the proceeds delivered to the Center. More specifically, none of it was used to deal in debentures or other securities of Brown-Dynalube Company or Massie Construction Company (hereinafter, respectively, "B.D." and M.C."). It was the Foundation's receipt and dispostion of B. D. securities and its investment in M.C. debentures which the Commissioner determined in 1965 constituted operations for the benefit of E. S. Dillard to the detriment of the Foundation.

There was no criticism by the Commissioner of any gifts to the Foundation or any of its activities until he began his investigation in 1963.

That the Commissioner was intimately acquainted with the details of the opera-

tion of the Foundation is apparent from his using his knowledge of the Foundation's investment in B.D. and M.C. securities, and the exchanges of these securities, as the basis for his ruling in 1965 that the Foundation had been operated partly for the benefit of E. S. Dillard, and his making this ruling retroactive so as to deny the deduction of the $75,000 gift made by the Taxpayer via the Foundation on October 30, 1959.

The Claim for Refund of the Taxpayer, filed after the denial of the $75,000 deduction, was made on Form 843 as prescribed by the Commissioner, and set out the following:

1. The claimant was Old Dominion Box Company, Inc., Lynchburg, Virginia.

2. The claimant filed its return in the office of the District Director in Richmond, Virginia.

3. The claim was for overpayment of Federal Income Taxes for the year 1959 in the amount of $31,796.14 principal and $5,166.30 interest, which had been paid on June 16, 1961, September 28, 1965, and October 1, 1965.

4. The amount claimed as a refund was computed on the Form 843 as follows:

"Estimated tax pd. $152,708.75
Tax pd. with orig. return 225,650.12
Any add'l inc. tax pd. 57,625.13
Total tax paid 465,984.00

(cont'd)

Less: your computation of correct tax	402,062.12
Amt. of overpayment	63,921.88
Amt. previously refunded	32,125.74
	$ 31,796.14 Prin."

5. The reasons why the claimant believed its claim should be disallowance in the tax year ended 1/1/60 of $75,774.69 of charitable contributions made by the taxpayer to Dillard Foundation, Inc. was improper for two reasons: First, the donee was a qualified charitable entity, and, second, the taxpayer innocently made its contributions in good faith in reliance on the donee's charitable status."

No brief was required with the Form 843 and none was filed.

The Trial Court held, sanctioning the Commissioner's position, that this Claim for Refund, despite the notification to the Commissioner of the ground for the deduction on the Taxpayer's Form 1120, the continuing audits of the Taxpayer and the Foundation over a period of years, and the full information supplied to the Commissioner, was insufficient to enable the Taxpayer to take advantage of the fact that the gift was intended by the Taxpayer for and reached the Center, an acknowledged charity. There is no dispute that, had the gift been made by the Taxpayer directly to the Center, the deduction would be allowed. The reasons advanced by the District Court and the Court of Appeals for their refusal to consider the merits were that

the grounds set out in the Claim for Refund neither stated the above theory, nor did they bring home to the Commissioner the significance of the facts which he admittedly had in his possession.

REASONS FOR GRANTING THE WRIT

1. <u>This case establishes requirements inconsistent with and more stringent than those established by decisions of this Court and the other Circuits; and demonstrates the need for a definitive statement of the requirements of a claim for refund under IRC §7422(a).</u>

Aside from correcting an apparent injustice to the Taxpayer, the instant case is an excellent vehicle for the Court to use in clarifyint the requirements of a claim for refund under IRC §7422(a).

The instant Claim for Refund identified the Taxpayer, the year, the type of tax, the amount of the refund sought, the computation, the particular deduction claimed to have been erroneously denied, and gave as ground for the deduction that it was a charitable gift. (It also gave as a ground that the gift was innocently made). There is involved in such deductions only §170 of the Internal Revenue Code, the section which, and which alone, provides for deduction for Income Tax purposes of charitable gifts by corporations.

The Claim for Refund was filed after the Commissioner had been studying and conferring with the Taxpayer for seven years concerning all details of its income and disbursements.

That the returns of the Taxpayer and the Foundation had been audited is an understatement. The Commissioner had in hand, not only other Federal Income Tax Returns of the Taxpayer, but its records and other information furnished to him over a period of years.

The Commissioner also had in hand for over four years all of the information returns of the Foundation, as well as its records (including especially those showing that the $75,000 gift was received by the Foundation for the Center and was transmitted to the Center), as well as its own original ruling letter of 1953 warning the Foundation that it would maintain its charitable status only if its distributions were solely to charitable entities.

The Claim for Refund advanced two theories: that the donation was to an entity which was a charity at the time of the gift, and that the gift was innocently made. Certainly any reasonable construction of the second ground that the Taxpayer was an innocent giver would encompass the theory of the Faulkner case that the gift was made to the Foundation for transmission to the Center, which was an acknowledged charitable entity.

This Court has not discussed the requirements of a claim for refund for overpayment of Federal taxes since 1945.

Angelus Milling Co. v. Com'r, 325 U.S. 293, 89 L.Ed. 1619 (1945)

Prior to that time, this Court had considered the question several times, under statutes and regulations substantially

similar to those currently in effect, in cases which discussed two principles: whether the claim is sufficient; and whether, assuming it is not, the Commissioner has waived the requirements of the statute.

Angelus Milling Co. v. Com'r, supra
U.S. v. Kales, 314 U.S. 186, 86 L.Ed 132 (1941)
Real Estate - Land Title & Trust Co. v. U. S., 309 U. S. 13, 84 L.Ed. 542 (1940)
U.S. v. Garbutt Oil Co., 302 U.S. 528, 82 L.Ed. 405 (1938)
U.S. v. Andrews, 302 U.S. 517, 82 L.Ed. 398 (1938)
Bemis Bros. Bag Co. v. U.S., 289 U.S. 28, 77 L.Ed. 1011 (1933)
U.S. v. Prentiss & Co., 288 U.S. 73, 77 L.Ed. 626 (1933)
U.S. v. Memphis Cotton Oil Co., 288 U.S. 62, 77 L.Ed. 619 (1933)
U.S. v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 51 S.Ct. 376 (1931), 75 L.Ed. 1025
Bonwit Teller & Co. v. U.S., 283 U.S. 258, 75 L.Ed. 1018 (1931)
Tucker v. Alexander, 275 U.S. 228, 72 L.Ed 253 (1927)

The Courts of Appeal have likewise discussed and attempted to apply both principles.

Brigham, et al v. U.S. (Ct. Cl. 1972), 470 F. 2d 571
Stoller v. U.S., 5th Cir. 1971, 444 F. 2d 1391
Commercial Solvents Corp. v. U.S. (Ct. Cl. 1970), 427 F. 2d 749
U.S. v. Smith (5th Cir. 1969), 418 F. 2d 589

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Warner v. Walsh, D. Conn. 1927, 24 F. 2d 449

According to this Court's opinion in the Angelus Milling Co. case, supra, this Court has not achieved a clear statement of the waiver principle. The Court said (325 U.S., p. 296, 89 L.Ed. pp. 1622-3):

> "Candor does not permit one to say that the power of the Commissioner to waive defects in claims for refunds is a subject made crystal-clear by the authorities. The question has been somewhat complicated by cases involving amendments of claim."

It is submitted that the Court has also failed to establish a standard sufficiently clear to deliver the sufficiency of a refund claim. The problem is expressed as a dilemma by Frankfurter, J., in the same opinion (325 U.S. 297-8, 89 L.Ed. 1623); and the opinion fails to enunciate a standard sufficiently positive to guide those concerned with the problem.

It is true that this Court has generally repeated that the claim is sufficient if the attention of the Commissioner is focused on the merits of the case, and he is not misled or deceived.

Thus, in the Tucker case, the Court said (275 U.S. 231, 72 L. Ed. 256):

> "If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidely in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings."

In the Bonwit Teller case, the Court said (283 U.S. 265, 75 L.Ed. 1022):

> "The Commissioner within the time allowed was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim * * *."

In the Kales case, the Court said (314 U. S. 194, 86 L.Ed. 138):

> "This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regu-

> lations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. (citing cases) * * *This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. * * *"

These statements are to be contrasted with the opinion of a panel of the Fifth Circuit, in the Hancock Bank case--relied upon by the Fourth Circuit in the Sapping-ton case--in which it is said summarily:

> "In our view a proper conclusion does not depend on whether the government is shown to have been misled to its prejudice."

The denial of a taxpayer's claim without consideration of the merits postulates that the Government may have funds of the taxpayer to which it is not entitled. All claims for refund are, of course, addressed to an expert in the field of taxation, charged with an expert's knowledge of the applicable law and practice, and actually in possession, from the filing of the taxpayer's original return, of at least some of the applicable facts. It is logical, in view of these two considerations, to conclude that claims for refunds should be interpreted generously from the point of view of the taxpayer. Cases of this Court and some of the Circuits definitely so indicate. For example, in addition to the cases holding that the requirements of the statute have been waived by the Commissioner, this Court has held that where the formal claim for refund was filed by the

taxpayer after the statutory period, prior correspondence between the Commissioner and the taxpayer sufficient to enable the Commissioner to consider the claim on its merits was sufficient (Bonwit Teller); that the filing of a claim for refund without stating any ground could be amended after the statutory period had run, if the claim has been considered on its merits (Memphis Cotton Oil Co.); that a claim was sufficient that presented two theories of recovery and added a third after the statutory period, even though the third ground was the only one upon which relief could be granted (Bemis Bros. Bag Co.); and that where the facts have essentially been given to the Commissioner and he had been put on notice that the taxpayer would file a claim if facts developed favorably for her, the filing of a formal claim after the expiration of the statutory period would be taken as a proper amendment (Kales).

The lower Courts have also interpreted claims for refund liberally. So it was held that a claim filed in the name of a trust created by an individual would be treated as a claim filed by the individual where all of the claims were submitted in the same bundle, and the Commissioner knew with whom he was dealing, even though the ground of the claims for refund (that the income had been received by a charitable entity) was not clearly set forth (Thompson); that a claim for refund on the ground of depletion was sufficiently broad to cover the taxpayer's proof that he was entitled to a greater amount than that claimed and on a different theory of depletion allowance under a statute enacted subsequent to the filing of the original claim (Standard Lime & Cement Co.); that where the taxpay-

er filed a claim for refund on the ground that attorneys' fees were deductible from income, it could recover a refund on the basis that it was required to make distributions of income to taxpayers where this obligation had been mentioned in the original claim for refund but not relied upon (Manufacturers Hanover Trust Co.); and that a claim for refund was sufficient stating that an item was "improperly" included in an estate whereas the proof was that the taxpayer as a life tenant was indebted to the remainderman under Pennsylvania law for the same item, it appearing that the Government had information from its participation in the State Court litigation what the ground for the claim was (Purnell).

Relief has been denied by this Court to a taxpayer who attempted to change the category of his claim during the proceeding (Felt & Tarrant; Prentiss; Andrews; Garbutt Oil; Real Estate - Land Title); or who has failed to give the information required by the regulations although a claim was filed by a related corporation supplying some of the information (Angelus Milling). Relief has been denied by the lower Courts where the taxpayer has filed no refund claim at all for the year or years involved (Brigham); or has attempted without timely amendment to change the category of his claim (Stoller; Herrington; Sappington; Hancock Bank).

The Commissioner has made it clear in his own regulations that he should be charged with knowledge of the ground of a refund claim from the original return (1040 for an individual or 1120 for a corporation) filed with him. As appears from the Regulations,

supra, p. 4, the taxpayer is expressly given the option, where income tax refund is claimed, to file on Form 843, which expressly requires that the taxpayer give his "reasons", or to file an amended 1040 or 1120 which contain no such requirement. The reason for this appears obvious. It is generally apparent, from the original return filed, in what category income is, e.g., whether it is ordinary income or capital gain. It is also apparent in what categories deductions fall, e.g., whether for medical expenses, business expenses, local taxes, or charitable gifts. Since the Commissioner is already informed of the general category for which the refund is claimed, and is also informed of the amount, type of tax, and year, as well as the identity and address of the taxpayer, he has all the information that he needs to act on the "merits of the claim".

It appears, from a reading of the cases of this Court as well as those of the lower courts, that none has expressly relied upon the fact that this information is already in the Commissioner's possession, although, as appears from the Kales and Bonwit Teller cases, for example, this Court has taken cognizance of the fact that information (other than that on Form 843) furnished to the Commissioner by the taxpayer which relates to the claim should be taken into consideration in evaluating it, if not in and of itself treated as an informal claim.

To fail to charge the Commissioner with the receipt of the original return of the taxpayer and with the information contained therein, and to fail to require the coordination of the original returns with claims later submitted would be to permit

the Commissioner to ignore realities known to millions of taxpayers and taken into consideration by the hundreds of thousands of taxpayers who file claims for refund.

There has also been surprisingly little discussion of the problem of semantics involved in the use of the words "grounds", "reasons", "theories", and "arguments". The statute (supra, p. 3) provides only that the taxpayer must file the claim for refund under the Commissioner's regulations. It does not require the taxpayer to specify the area of the income tax law into which his claim falls. The Commissioner in his regulations (supra, pp. 3-4) has used the word "ground" in requiring the taxpayer to specify the particular area of the tax law concerned. On his Form 843, however, he instructs the taxpayer to give his "reasons". The only case we have seen which comes directly to grips with the problem of semantics is the District Court case decided in 1927, in which the Court said:

> "Assuming, however, that the facts upon which a claim for refund is predicated must be incorporated in the notice of claim, and assuming that the plaintiff is precluded from setting up any further facts in her complaint, I cannot find that the notice of claim filed in the case at bar is deficient. The Commissioner is therein apprised of all the material facts. It is true that the theory of the relief is not set out. But the theory of a claim for relief is something separate and apart from the facts, and the same set of facts may, and often does, give rise to differing theories. To say that an

> argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."

Warner v. Walsh, supra, 24 F. 2d, at p. 450

This court has made it clear in Bemis Bros. Bag, Co., supra, that the taxpayer need not specify the relief appropriate to the facts he has pleaded, saying (289 U.S. 34, 77 L.Ed. 1014):

> "But for the purpose of determining the limits of permissible amendment, a change in the legal theory of a suit, 'a departure from law to law', is no longer accepted as a test of general validity. U.S. v. Memphis Cotton Oil Co., supra, and cases there cited. Still weaker is a test derived from the prayer for relief, the mere demand for judgment. The rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not."

This Court has several times made the analogy between a claim for refund and permissible amendments of it, and pleadings in a court proceeding with permissible amendments. (See the Bemis Bros. and Memphis Cotton Oil Co. cases supra). While the generally accepted test for permitting an amendment of a pleading after the statutory period has run is whether the amendment sets

out a cause of action different from that originally alleged, it is submitted that a claim for refund, being addressed to an expert in a comparatively narrow field, who already has considerable information about the case, should be construed more broadly than a pleading setting forth a cause of action.

Since the Angelus Milling case was decided in 1945, when the Court was concerned with the possibility that the Commissioner might be unfairly charged with knowledge of scattered information supplied him from time to time by the taxpayer, it is well known that taxpayers have been assigned individual numbers; and that, with the use of computers, it is much fairer to assume that the Commissioner is able readily to assemble in one place all the information concerning a claim which has been submitted to him. This fact was doubtless in the mind of the panel of the Fifth Circuit when it said in the Thompson case (p. 661):

> "This holding in no way brings in the question the Supreme Court's rejection in Angelus Milling Co. * * * of the taxpayer's contention that the Commissioner is charged with knowledge of all he might learn from his vast files. Here the Director treated all together. All the information was physically together and substantially related. He did not have to look elsewhere 'somewhere under the Commissioner's roof***'. It was all there. The Director did not have to look for. All he had to do was to look at." (Italics the Court's).

The following factors especially make the instant case a timely and appropriate one for consideration by this Court:

1. Claims for refund currently, somewhat inflated by Civil Service claimants, are running at the rate of over a million in number, involving approximately a billion dollars a year (See App., pp. 26-7).

2. This case graphically involves many of the factors common to cases in this field:

   a. The original return filed showed the ground of the claimed deduction.

   b. The ground of charitable contribution was considered and used as the basis for disallowance by the Commissioner.

   c. Prior to the filing of the Claim for Refund, the Commissioner assembled in one place documents and data relating to the subject of the claim, and involving both the Taxpayer and the Foundation.

   d. The Claim for Refund stated two grounds: first, that the donee was a charitable entity, and second, that the gift was innocently made. The Commissioner in his original ruling had emphazied that the ultimate donee of gifts to the Foundation was crucial.

e. The Commissioner had in his possession the "follow-theres" documents as well as other data showing his knowledge of the intricate details of the Foundation's operations, and studied them for years, before and after the filing of the Claim for Refund.

f. The Commissioner did not invite or receive a brief, or suggest that the significance of the date given to him be pointed out, or otherwise object to the claim; and has waived any defects therein.

g. The Commissioner waived all objections to the amendment of the complaint knowingly and after due deliberation.

h. There is no question that an injustice has been done to the Taxpayer in that it made a gift for the use of an acknowledged charity. It has been prevented from a hearing on the merits, with the result that the Government retains funds which are acknowledged not to belong to it.

3. The tendency of the Fifth and Fourth Circuits in recent years has been to ignore the purpose of the statute requiring claims for refund and to place on taxpayers an increasingly difficult task of submitting qualifying claims. The

Fourth Circuit in Sappington said, contrary to the policy of the statute as declared by this Court, that the failure to comply "strictly" with the statute and the regulations barred recovery.

4. The instant case, establishing the requirement that the taxpayer not only furnish the facts but bring home their significance, places a novel and intolerable burden on taxpayers, as illustrated by the result in this case - a requirement unjustified by the statute and regulations as heretofore interpreted by this Court and other Circuits.

5. The principle that the Commissioner may intentionally or inadvertently wiave defects in a claim for refund should be reconsidered. Factors heretofore considered as establishing a waiver may instead be directed toward the question of the sufficiency of the claim. Otherwise the Commissioner is given a difficult power, without any necessity for his havint it, to discriminate among taxpayers.

2. The Taxpayer was an innocent donor.

The Taxpayer was not responsible for the activities of the Foundation which gave rise to the issuance of the revocation letter. The $75,000 gift was held intact by the Foundation until the proceeds were delivered to the Center. These facts are without dispute.

It is also without dispute that the Taxpayer had no knowledge on October 30, 1959, (or indeed until 1963) that the Foundation's exempt status might be revoked in 1965.

The Taxpayer was consequently an innocent donor under the Treasury ruling, appendix, pp. 24-5, requiring either knowledge of the impending revocation or responsibility for the activities later criticized.

In order to repudiate this ground of recovery, the Fourth Circuit would deny innocence to any donor to a Foundation who was aware of the activities which may years later be held offensive. Such a change of the Commissioner's regulation would seem to be unjustified both by the language of the law, and the policy. To penalize a corporation, and its non-participating stockholders, for unsuccessful efforts by an officer to minimize his individual taxes is not sanctioned either by the law or policy.

The record containing no evidence to support the jury's finding on question No. 3, the responsibility of the Court to set aside this finding is clear.

3. The Foundation was a charitable donee at the time of the gift; if not, the gift was literally made to it "for the use of" the Center.

Independent of the argument that the Foundation served as a conduit for the gift to the Center, it is submitted that the Foundation was an exempt organization at the time of the gift in 1959. The lan-

guage of the letter of revocation issued in 1965 is inconsistent with the actual facts, since the Foundation neither received any detriment from the dealing in the securities criticized by the Commissioner, nor did E. S. Dillard derive any benefit therefrom.

The evidence thus fails to support the Commissioner's ruling of non-exemption; and, again, the duty of the Court to set aside the jury's findings to the contrary is clear.

The gift was undisputedly for the use of the Center, an acknowledged charity; and literally complies with the statute (Appendix, pp. 21-2) allowing the deduction.

CONCLUSION

In the Tucker case this Court warned against the use of the statute as a "trap for the unwary"; in the Angelus Milling this Court said that even tax administration did not preclude considerations of fairness; and this Court has repeatedly said that the principal aim of the statute was that the Commissioner consider the merits of the claim.

That Forms 843 may be used by laymen as well as experts should not be forgotten.

The trend climaxed by the instant decision should be reversed.

This Court has never considered the appropriateness of the Treasury ruling re contributions by an innocent donor to a charitable entity when exemption is sub-

sequently revoked.

The questions clearly presented in this case are of importance in the administration of the tax laws; and the decision should be reviewed.

Respectfully submitted,

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By _____
Edward S. Graves

Attorney for the Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have served three copies of the Petition for Certiorari in this case on the Solicitor-General, Department of Justice, Washington, D. C. 20530, by mailing copies to said address this 16th day of July, 1973.

_____
Edward S. Graves, of Counsel
for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

OLD DOMINION BOX COMPANY, INCORPORATED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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July 16, 1973

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2285

OLD DOMINION BOX COMPANY,
INCORPORATED, a Virginia Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. H. E. Widener, Jr., District Judge.

(Argued February 6, 1973. Decided April 18, 1973).

Before BUTZNER and FIELD, Circuit Judges, and MURRAY, District Judge.

Edward S. Graves (B. C. Baldwin, Jr. and Edmunds, Williams, Robertson, Sackett,

Baldwin and Graves on brief) for appellant; Robert S. Watkins, Attorney, Tax Division, United States Department of Justice,(Scott P. Crampton, Assistant Attorney General of the United States, Meyer Rothwacks and Bennet N. Hollander, Attorneys, Department of Justice, and Leigh B. Hanes, Jr., United States Attorney for the Western District of Virginia, on brief) for appellee.

BUTZNER, Circuit Judge:

Old Dominion Box Company, the taxpayer, appeals from a judgment of the district court denying it a refund of income taxes in the amount of $31,796.14 and interest, which it had paid following disallowance by the Commissioner of Internal Revenue of a deduction for a $75,000 charitable contribution to the Dillard Foundation in the fiscal year ending January 1, 1960. Old Dominion claims that it was entitled to the deduction under any one of three theories: (1) the foundation was a qualified charitable organization at the time the contribution was made; (2) Old Dominion was an innocent contributor to the foundation, even though the tax exempt status of the foundation was subsequently retroactively revoked; or (3) the contribution was intended for and did in fact reach the Lynchburg Fine Arts Center, a qualified charity. The jury found against the taxpayer on the first two theories, and the court ruled against it on the third. Perceiving no error, we affirm.

I

Old Dominion, a Virginia corporation located in Lynchburg, Virginia, is controlled by the Dillard family. In 1959 it sold some of its manufacturing plants and from the profits made a $75,000 contribution to the Dillard Foundation. The deduction for this contribution was disallowed following an investigation of the Dillard Foundation by the Commissioner.

The Dillard family created the Dillard Foundation in 1951 to accept donations and disburse funds for charitable purposes, and the Commissioner granted it an exemption from federal income taxes in 1953. Between 1951 and 1963, the foundation made donations in excess of $500,000 to many recognized charities. In 1965, the foundation's exemption was retroactively revoked because the Commissioner ruled that it had been operated for the benefit of private interests instead of for charitable purposes. The Commissioner determined that the foundation's dealing in certain securities was a substantial departure from its charitable functions. He took the position that these transactions were designed to enable E. S. Dillard, president of Old Dominion, to claim on his personal income tax returns inflated charitable deductions when he gave some of the securities away.[1] For

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1. The Commissioner had previously ruled that E. S. Dillard could not deduct the

its part, Old Dominion asserts that the foundation dealt in the securities in the ordinary course of investing funds, a practice permitted to all charitable foundations.

The evidence disclosed that in 1954, E. S. Dillard, who in addition to being president of Old Dominion was an officer and director of the Dillard Foundation, acquired all of the claims against the Brown Dynalube Company and all of its outstanding stock from a transferee of Dynalube's organizers for $1.00. He immediately paid Dynalube $1,828.24 and transferred to the company all of the claims that he had acquired against it. In return, he received Dynalube's six per cent debentures having a face value of $85,000. Several months later he paid Dynalube $2,500 for another debenture with a face value of $2,500. Thus, he acquired Dynalube debentures with a total face value of $87,500 in exchange for $4,328.24.

(Footnote 1 continued)

face value of the debentures which he gave to charity in 1954 and 1955 because sales of the debentures by the charities were not arms length transactions and did not establish fair market value. The Tax Court, after redetermining the value of the debentures, affirmed the Commissioner's ruling. E. S. Dillard and Jean T. Dillard, 1961 T.C. Mem. 30, 1961, P-H Tax Ct. Mem. ¶61,030.

At the time E. S. Dillard acquired the debentures he intended to give them away instead of selling them. Acting on this intention, between 1954 and 1958 he donated $59,000 in Dynalube debentures to the foundation and $26,000 to a church. He deducted the face value of these debentures as charitable contributions on his personal income tax returns.

Beginning in 1956, the foundation disposed of the debentures received from E. S. Dillard by selling them at face value, either to the Massie Construction Company or to the Minor Foundation, which then sold them to Massie. In the meantime, the church sold its $26,000 worth of debentures to Massie or to intermediaries who in turn sold them to Massie.

The Massie Construction Company and the Minor Foundation were informally linked to the Dillard Foundation through William T. Minor, Jr. His family established the Minor Foundation and his father-in-law was the owner of the Massie Construction Company. Minor served at one time or another as attorney and accountant for Old Dominion, E. S. Dillard, the Dillard Foundation, the Minor Foundation, the Brown Dynalube Company, and the Massie Construction Company.

By September 15, 1959, Massie had purchased at face value the entire $87,500 issue of Dynalube debentures -- $85,000 from charities, including the Dillard Foundation, or

the transferors of charities, and $2,500 directly from E. S. Dillard. Coincidentally, between 1955 and September 15, 1959, the Dillard Foundation had acquired all of the outstanding six per cent debenture bonds of the Massie Construction Company, aggregating $96,350, by purchasing $81,850 at face value and receiving a donation of a $14,500 bond from E. S. Dillard. Throughout this period, the financial condition of both Dynalube and Massie ranged from marginal to precarious.

In August 1959, E. S. Dillard relinquished ownership of Dynalube by giving his stock to the company's former president. A month later, Massie exchanged its entire holdings of Dynalube debentures, aggregating $87,500, for 875 shares of Dynalube stock. The Dillard Foundation then traded all of its Massie bonds, having a face value of $96,350, to Massie, in exchange for the 875 shares of Dynalube stock and $8,850 in cash. Finally, the foundation donated the 875 shares of Dynalube stock to a church, which in turn sold the stock to the former president of Dynalube for $87.50.

II

Section 501 of the Internal Revenue Code of 1954 [2] exempts from taxation a foundation

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2. Int. Rev. Code of 1954, §501(c)(3) describes an exempt organization:

> "Corporations, and any community chest, fund, or foundation, organized and

organized and operated for charitable purposes. The district court properly instructed the jurors that in order for them to hold that the foundation was not operating for charitable purposes they must find that its trading in Dynalube and Massie securities was a substantial part of its activities or diverted a substantial part of its resources. It submitted the case on the following special interrogatories, which the jury answered in the negative:

> "1. Did the Dillard Foundation operate at all times during the twelve-month period ending November 30, 1959 for religious, charitable, and educational purposes?
>
> "2. If the answer to question 1 is 'No', was the Dillard Foundation operating for religious, charitable, and educational purposes when the gift of $75,000.00 was pledged on October 30, 1959?"

(Footnote 2 continued)

> operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder

The role played by the foundation in inflating the value of the Dynalube debentures reported by E. S. Dillard as charitable deductions on his personal income tax return amply

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(Footnote 2 continued)

> or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation,and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Taxpayers are entitled to deduct contributions to exempt charitable foundations by virtue of Int. Rev. Code of 1954, §170(a)(1), which provides:

> "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year . . ."

Int. Rev. Code of 1954, § 170(c)(2) describes a qualified charity:

> "For purposes of this section, the term ' charitable contribution' means

supports the jury's finding that during the times pertinent to this case, the foundation was not operating for charitable purposes. The foundation's substantial non-charitable activities destroyed its entitlement to an exemption, regardless of its other charitable undertakings. Cf. Better Business Bureau v. United States, 271 U.S. 279, 283 (1945).

(Footnote 2 continued)

a contribution or gift to or for the use of--

. . .

"A corporation, trust, or community chest, fund, or foundation--

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State or Territory, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

Moreover, the foundation's exemption cannot be preserved on the ground that its dealings in Dynalube debentures generated income for other charitable gifts. Stevens Bros. Foundation, Inc. v. Commissioner, 324 F. 2d 633, 639 (8th Cir. 1963), cert. denied, 376 U.S. 969 (1964); cf. University Hill Foundation v. Commissioner, 446 F. 2d 701, 703 (9th Cir. 1971), cert. denied, 405 U.S. 965 (1972); United States v. Community Services, Inc., 189 F. 2d 421, 425 (4th Cir. 1951). It is, therefore, clear that Old Dominion cannot recover on the ground that the Dillard Foundation was an exempt charity.

III

The Commissioner in the exercise of his sound discretion may retroactively revoke an exemption. Int. Rev. Code of 1954, §7805(b);

(Footnote 2 continued)

> (D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.
>
> "A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B)."

Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184 (1957). The Commissioner, however, has provided by regulation that the charitable deductions of innocent contributors to an organization whose exemption has been forfeited will not be retroactively disallowed. Treas. Reg. § 1.503(e)-1 (1958); Rev. Proc. 64-25, 1964-1 Cum. Bull. 694. In this case, the Commissioner's ruling revoking the foundation's exemption expressly limited its retroactive effect to protect innocent contributors, but it stated that this would not preclude disallowance of deductions made by contributors who were aware of the foundation's activities.

Answering a special interrogatory, the jury found that Old Dominion was not an innocent contributor at the time that it pledged the $75,000 to the foundation. This finding, we conclude, is amply supported by the evidence. D. H. Dillard, chairman of Old Dominion's board, E. S. Dillard, the company's president, and W. C. Pritchett, its vice president for finance, were all officers and directors of the foundation. William T. Minor, Jr. served as attorney and accountant for both the company and the foundation. E. S. Dillard and Pritchett played an active role in the foundation's Dynalube-Massie transactions, and E. S. Dillard was the direct beneficiary of these activities. D. H. Dillard died before this case was tried, and there is no direct testimony concerning his knowledge. The

evidence disclosed, however, that during the time the foundation was dealing in Dynalube and Massie securities, he closely followed the foundation's day to day operations and no significant action could be taken without his approval. From this the jury could infer that he, too, was aware of the activities that led to the revocation of the foundation's exemption.

Invoking familiar principles of agency, Old Dominion argues that its officers' knowledge of the foundation's affairs cannot be imputed to the company because they were not acting within the scope of their employment while engaged in the foundation's business. This issue raised a factual question, which the trial court submitted to the jury with appropriate instructions. The jury's rejection of Old Dominion's position is amply supported by the record. Old Dominion and the foundation were related by more than interlocking directorates. The officers of the foundation used the company's facilities to transact the foundation's business, and they performed services for the foundation on company time. The jury was entitled to infer that Old Dominion acquiesced in and approved the participation of its officers in the foundation's work.

Because of the jury's finding, Old Dominion is not entitled to take advantage of the exception the Commissioner made for innocent contributors in the revocation ruling.

IV

Old Dominion's third ground for recovery is based on the government's concession during the trial that the company's contribution, though made to the foundation, was intended by the company for the Lynchburg Fine Arts Center, an admitted charity, and that the foundation transmitted the contribution to the Center. We do not reach the merits [3] of this claim, for, in agreement with the district judge, we hold that it is barred as untimely.

Old Dominion's claim for refund stated:

> "The disallowance in the tax year ended 1/1/60 of $75,774.69 of charitable contributions made by the taxpayer to Dillard Foundation, Inc. was improper for two reasons: First, the donee was a qualified charitable entity, and, second, the taxpayer innocently made its contributions in good faith in reliance on the donee's charitable status."

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3. On the merits, Old Dominion relies on Faulkner v. Commissioner, 112 F. 2d 987 (1st Cir. 1940). In response, the government asserts that Faulkner is distinguishable on its facts and that the result urged by Old Dominion would negate the provisions of §170(a)(1) and (c).

The company's complaint originally was based on the two theories set forth in this claim. While the suit was pending in its pretrial stages, but after the period of limitations for an administative refund claim had run,4 the company amended its complaint to allege:

> "4A. The contribution of $75,000 was intended by the plaintiff for and was duly received by Lynchburg Fine Arts Center, Inc., which was at all relevant times a charitable corporation within the meaning of said Section 501(c)(3), contributions to which were deductible for Federal Income Tax purposes."

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4. Int. Rev. Code of 1954, §6511(a) sets forth the limitations period for filing a claim for refund:

> "Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this

Before instituting an action to recover taxes, a taxpayer must file a claim for refund setting forth the grounds for recovery. [5] Despite the omission of any reference to the

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(Footnote 4 continued)

> title,which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid."

The Commissioner has expanded on this requirement in Treas. Reg. §301.6402-2(b) (1) (1954):

> "No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof . . ."

Old Dominion made the final payment of the assessment on October 1, 1965. The claim for refund was filed with the Commissioner on September 21, 1967, and the complaint was amended to set forth the new grounds on July 5, 1972.

5. Int. Rev. Code of 1954, §7422(a) provides that "[n]o suit . . . shall be maintained . . .

foundation as a conduit for the contribution to the Fine Arts Center in its administrative claim for refund, Old Dominion insists that it has complied with the Code. It asserts that its original claim was adequate to make the Commissioner aware of the theory set forth in its amended complaint for the following reasons: the original claim stated that the gift was made to a qualified charity; the foundation's practive was not to retain donations, but merely to serve as a conduit to qualified recipients; on audit, the Commissioner had all of the documents relating to the transactions at his disposal; these documents established that the donation was intended for and did in fact reach the Lynchburg Fine Arts Center, which is a qualified charity. Moreover, Old Dominion contends that its amended complaint was sufficient to present the issue because the amendment did not vary thetheory of recovery, but simply specified the facts in greater detail.

The cases interpreting the requirement of a timely claim for refund do not support Old Dominion's position. In United States v. Andrews, 302 U.S. 517, 524 (1938), the Court said:

(Footnote 5 continued)

for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed . . . until a claim for refund or credit has been duly filed .. ." See Treas. Reg. § 301.6402-2 (1954).

> "Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim."

Applying this rule, we recently held in Sappington v. United States, 408 F.2d 817, 819 (4th Cir. 1969):

> "A claim seeking refund upon one asserted fact situation may not be amended out of time so as to require an investigation of matters not germane to the original claim. . . While an amendment which only makes more definite matters already within the Commissioner's knowledge is permissible, the fact of specification of the original claim tends to confine the administrative investigation to that issue."

The principles stated in Andrews and Sappington govern this issue. The original claim for refund was not general. It specified that the foundation was a qualified charity and that the taxpayer was an innocent contributor. It contained no mention of the Fine Arts Center and no suggestion that Old Dominion was relying on the theory that the foundation served only as a conduit to pass the contribution to an exempt organization. Indeed, the record supports the opposite inference, because the facts alleged in the amendment were inconsistent with the original claim which named the foundation as donee. For this reason it is apparent that the amendment was an impermissible shift to a new and different ground. United States v. Garbutt Oil Co., 302 U.S. 528, 531 (1938).

Nor can Old Dominion prevail simply because the records documenting the purpose of the contribution were examined by the agent who audited the claim. The agent testified that although the documentary evidence pertaining to the contribution was available, its significance as a basis for Old Dominion's claim was not apparent to him. Furthermore, during the course of his audit no representative of either the foundation or the company explained the pertinence of the records to the claim, and he did not learn of the conduit theory until just before trial. The Commissioner, through his agents, cannot be expected to formulate from raw facts a taxpayer's unarticulated claim. Cf. Stoller v. United States, 444 F.2d 1391, 1393 (5th Cir. 1971).

Old Dominion urges that the failure of the government to oppose amendment of the complaint constitutes a waiver of any objection to the amendment's basis for recovery. We reject this contention for two reasons. First, because, as we have previously held, the amendment constituted a new ground for recovery, no officer of the government could waive the statute of limitations. See United States v. Garbutt Oil Co., 302 U.S. 528, 533 (1938). Second, the amendment was made to paragraph 4 of the complaint, which dealt only with factual matters. Paragraph 10, which set forth the grounds for recovery, remained unamended. When the government learned that the amendment was a ground on which Old Dominion sought recovery, it moved to strike the amendment because it varied from the claim for refund. It is, therefore, clear that the government's conduct did not constitute a waiver.

The judgment of the district court is affirmed.

Judgment of the United States Court of Appeals for the Fourth Circuit

No. 72-2285

Old Dominion Box Company, Incorporated, a Virginia corporation Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Western District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed April 18, 1973

William K. Slate II, Clerk

Costs for the Appellants

Cost of printing appellee's brief $114.00
Total Costs $114.00

5/2/73: Appellant's petition for rehearing filed.
5/17/73: Order denying the petition for rehearing filed.

STATUTES AND REGULATIONS INVOLVED

As to question 2:

IRC, §170 (a) (1), 26 U. S. C. 170 (a) (1) reads as follows:

> "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate."

IRC, §170 (c) (2), 26 U. S. C. 170 (c) (2) reads in pertinent part as follows (italics supplied):

> "For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of--
>
> "A corporation trust or community chest, fund, or foundation--

"Created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

"No part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"No substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

"A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (b)***"

Regulations 1.170-3(a), 26 C. F. R. §1.170-3(a) read as follows:

"(a) In general. The deduction by a corporation in any taxable year for charitable contributions, as defined in §170(c), is limited to 5 per cent of its taxable income for the year, computed without regard to:

"(1) The deduction for charitable contributions,

"(2) The special deductions for corporations allowed under part VIII (except section 248), subchapter B. chapter 1 of the Code,

"(3) Any net operation loss carryback to the taxable year under §172, and

"(4) The special deduction for Western Hemisphere trade corporations under §922.

"A contribution by a corporation to a trust, chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals is deductible only if the contribution is to be used in the United States or its possessions for those purposes. See §170(c)(2). For the purposes of §170, amounts excluded from the gross income of a corporation

under §114 (relating to sports programs conducted for the American National Red Corss) are not to be considered contributions or gifts. For reduction or disallowance of certain charitable, etc., deductions, see paragraphs (c)(2), (e) and (f) of §1.170-1."

Rev. Proc. 64-25, CB 1964-1, 694 reads as follows:

"A ruling or determination letter holding an organization of the type contributions to which are deductible under §170 of the Internal Revenue Code of 1954 is effective only so long as there has been no material change in the character, the purpose, or the method of operation of the organization. If such a ruling is revoked or modified, the revocation or modification applies to all open years under the statutes, unless the Commissioner exercises the discretionary powers given to him under §7805 (b) of the Code to limit the retroactive effect of the ruling.

"Therefore, where an organization has been held to be of the type contributions to which are deductible under §170 of the Code, and the Internal Revenue, by a ruling or a determination letter, sebsequently holds that

it is not such an organization, contributions made to the organization by persons unaware of such new ruling or determination letter generally will be considered allowable (1) until the date that an announcement is published in the Internal Revenue Bulletin or otherwise made public to the effect that contributions are no longer deductible, or (2) until the termination date stated in such an announcement. However, this will not preclude the Service, in appropriate cases, from disallowing any contributions made before either of such dates where the contributor, prior to the publication of such announcement, (1) had knowledge of the new ruling or determination letter, (2) was aware that its issuance was imminent, or (3) was in part responsible for the activities or deficiencies which gave rise to its issuance. Also, see §505(e) of the Code and §1.503(3)-1 of the Income Tax Regulations." (Italics supplied)

As to question 3:

IRC §170(a)(1) and (c)(2) and Regulations 1.170-3(a) are set out supra.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Washington, D. C. 20224

Date 2, Jul, 1973 In reply refer to: C:I:P

Mr. Edward Graves
P. O. Box 958
Lynchburg, Virginia 24505

Dear Mr. Graves:

This is in response to your recent telephone inquiry concerning claims for refunds filed with the Internal Revenue Service.

We have been advised by our Audit Division of receipt of 1,423,000 claims involving $988 million in fiscal 1972 and 828,000 claims involving $559 million during the first half of fiscal 1973. These data are higher than those compiled for claims in prior years due chiefly to the substantial number of filings in recent years covering Civil Service Retirement contributions.

So that you can see a more consistent pattern, we are enclosing copies of tables reflecting claims filed in prior years.

If we can again be of assistance, please do not hesitate to call us.

Sincerely,

Roderic P. Young, Acting Chief
Programs & Field Services Branch
Public Affairs

Enclosures

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-133

OLD DOMINION BOX COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's jury charge and oral opinion are unofficially reported at 30 A.F.T.R. 2d 5677. The opinion of the court of appeals (Pet. App. 1-19) is reported at 477 F. 2d 340.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1973. A petition for rehearing was denied on May 17, 1973. The petition for a writ of certiorari was filed on July 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an issue first raised by petitioner in its amended complaint was barred by Section 7422 of the Internal Revenue Code of 1954.

2. Whether the jury's verdict was supported by substantial evidence.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth at Pet. 3-4 and Pet. App. 21-25.

STATEMENT

Petitioner is a Virginia corporation controlled by members of the Dillard family. In 1959 petitioner sold some of its manufacturing plants and from the profits made a $75,000 contribution to the Dillard Foundation—a family controlled charitable foundation which had been granted an exemption from federal income taxes in 1953. A charitable deduction claimed by petitioner for the contribution was disallowed following an investigation of the Dillard Foundation by the Commissioner of Internal Revenue. That investigation had resulted, in 1965, in the retroactive revocation of the foundation's charitable status because of the Commissioner's determination that the foundation had been operated for the benefit of private interests instead of exclusively for charitable purposes. Petitioner commenced the instant refund suit to recover the additional income taxes (in the amount of $31,796.14 plus interest) which it had paid as a result of the disallowance as a charitable deduction of its $75,000 gift to the Dillard Foundation (Pet. App. 2-3).

In its claim for refund filed with the Commissioner, petitioner set forth the grounds for recovery upon which it relied as follows (Pet. App. 13):

> The disallowance in the tax year ended 1/1/60 of $75,774.69 of charitable contributions made by the * * * [petitioner] to Dillard Foundation, Inc. was

> improper for two reasons: First, the donee was a qualified charitable entity, and, second, the * * * [petitioner] innocently made its contributions in good faith in reliance on the donee's charitable status.

Petitioner's complaint originally was based on the two theories set forth in the refund claim (Pet. App. 13-14). While the suit was pending, but after the period of limitations for filing claims for refund had expired, petitioner amended its complaint to allege that (Pet. App. 14):

> The contribution of $75,000 was intended by the * * * [petitioner] for and was duly received by Lynchburg Fine Arts Center, Inc., which was at all relevant times a charitable corporation within the meaning of said Section 501(c)(3), contributions to which were deductible for Federal Income Tax purposes.

Thereafter, and prior to trial, the government moved in the district court to dismiss petitioner's complaint insofar as it sought recovery on the newly added ground that the contribution in question was intended for the Lynchburg Fine Arts Center for the reason that such ground was not contained in petitioner's claim for refund and constituted an impermissible variance therefrom (Pet. App. 19). The district court denied the government's motion to dismiss, and the case was tried on the basis of the following special interrogatories to be answered by the jury (Pet. 6-7; Pet. App. 7, 11):

> 1. Did the Dillard Foundation operate at all times during the twelve-month period ending November 30, 1959 for religious, charitable, and educational purposes?

2. If the answer to question 1 is "no", was the Dillard Foundation operating for religious, charitable, and educational purposes when the gift of $75,000 was pledged on October 30, 1959?

3. If the answers to both questions 1 and 2 are "no", was the plaintiff an innocent contributor when the gift of $75,000 was pledged on October 30, 1959?

4. If the answers to questions 1, 2 and 3 are "no", was the $75,000 gift intended for Lynchburg Fine Arts Center, Inc., and did it reach the Center?

At the conclusion of the trial, the first three interregatories were answered by the jury in the negative. During the trial, the answer to the fourth interrogatory was conceded by the government to be "yes" and that interrogatory was withdrawn from the consideration of the jury (Pet. 7-8; Pet. App. 7, 11, 13).

After the jury answered in the negative the three special interrogatories submitted to it, the district court determined that petitioner's claim based upon a conduit theory was untimely. Judgment was therefore entered for the government. The court of appeals affirmed (Pet. App. 1-19).

ARGUMENT

1. The court of appeals correctly held that the issue which petitioner attempted to raise in its amended complaint (*i.e.*, that the $75,000 contribution made by it to the Dillard Foundation, Inc., was intended for and reached the Lynchburg Fine Arts Center, Inc., a qualified charitable corporation) was at variance with the grounds for recovery set forth in petitioner's claim for refund and, consequently, that that issue was barred by Section 7422 of the Internal Revenue Code of 1954.

26 U.S.C. 7422. That statute conditions the granting of relief upon the filing of a claim for refund which sets forth in detail each legal ground upon which the refund is claimed and sufficient facts to apprise the Commissioner of the soundness of the claim. Petitioner's claim for refund set forth only two grounds for recovery: (1) that the Dillard Foundation was a qualified charitable entity, and (2) that petitioner innocently made its contribution in good faith reliance on the foundation's charitable status.

Contrary to petitioner's assertions (Pet. 15, 26-27), the claim for refund neither put the Commissioner on notice that petitioner was claiming a refund on the ground that the $75,000 contribution was intended for and ultimately reached the Lynchburg Fine Arts Center, nor did it apprise the Commissioner of any facts sufficient to enable him to pass on such a claim.[1] Indeed, as the court below noted (Pet. App. 18), the allegation in the amended complaint, that the contribution was intended for the Lynchburg Fine Arts Center, was inconsistent with the claim for refund which named the Dillard Foundation as donee of the gift. Accordingly, the decision below, holding that the additional factual allegations pleaded by petitioner in its amended com-

[1]The refund claim contained no mention of the Fine Arts Center and, hence, no suggestion that petitioner was relying on the theory that the Dillard Foundation served only as a conduit to pass the contribution to an exempt foundation. The mere fact that the Commissioner may have been in possession of sufficient documentary evidence to determine the facts upon which petitioner's alternative theory was based (Pet. 27) is immaterial since the impact of those facts was not brought to the attention of the Commissioner during any of the audit procedures leading up to the trial. As the court of appeals noted (Pet. App. 18), it would be unreasonable to require the Commissioner, through his agents, to formulate from raw facts a taxpayer's unarticulated claim.

plaint constituted an untimely and impermissible attempt to shift to a new and different ground for relief, is in full accord with the decisions of this Court. See, *e.g.*, *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293; *United States* v. *Andrews*, 302 U.S. 517, 524. There is no conflict among the courts of appeals on this issue.

2. There is no basis for setting aside the jury's negative answers to the special interrogatories. There was ample evidence in the record to support the jury's findings that, during the times pertinent to this case, the Dillard Foundation was not operating for charitable purposes and that this fact was known by petitioner (see Pet. App. 3-6, 8-10, 11-12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
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Attorneys.

SEPTEMBER 1973.

[003-1973-09]